

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-1594

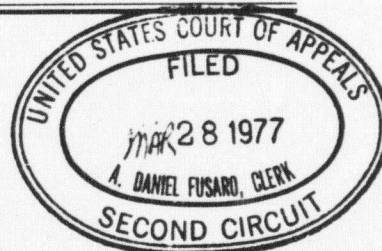
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
against
JOHN DEGRAFFENRIED,
Appellant.

On Appeal from the United States District Court for the
Southern District of New York (MacMahon, J.)

**APPENDIX TO THE BRIEF FOR
APPELLANT JOHN DEGRAFFENRIED**

BARRY H. GARFINKEL
Attorney For Appellant
John Degraffenried
Office and P.O. Address:
919 Third Avenue
New York, New York
10022
Tel. (212) 371-6000



PAGINATION AS IN ORIGINAL COPY

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RM:lk.
74-0456

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

JOHN DEGAFFENRIED,

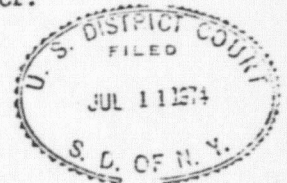
Defendant.

JUDGE MAC MAHON

74 CRIM. 392

INDICTMENT

74 Cr.



The Grand Jury charges:

On or about the 5th day of February, 1974, in the Southern District of New York, JOHN DEGAFFENRIED, the defendant, unlawfully, wilfully and knowingly did falsely make, alter, forge and counterfeit, and cause to be made, forged and counterfeited a writing, namely, the endorsement of the payee on a United States Treasurer's check, to wit, the words "George Knxx" on the back thereof, for the purpose of obtaining and enabling another person, either directly or indirectly to obtain from the United States and its officers and agents a sum of money, the check being a genuine obligation of the United States, and of the following tenor:

AIR FORCE ACCOUNTING AND FINANCE CENTER
DENVER, COLO. 35,346,227
SYMBOL 3800
Treasurer of the United States
1-8342
PAY TO THE ORDER OF - GEORGE KNXX
05/31/74 111-29 208 STREET
220389201 QUEENS VILLAGE NY 11429
1-8-94049
DO NOT FOLD, BRIGGLE OR MUTILATE
KNOW YOUR RIGHTS...
RETIREE PAY
PAYABLE ONLY
DURING LIFE OF PAYEE
00000-005

(Title 18, United States Code, Section 495.)

James R. Lister
FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

DOC A

JUDGE MAG MAHON
United States District Court
SOUTHERN DISTRICT OF NEW YORK
THE UNITED STATES OF AMERICA

vs.

JOHN DEGAFFENRIED,

Defendant.

INDICTMENT

74 Cr.

(18, U.S.C., §495)

PAUL J. CURRAN

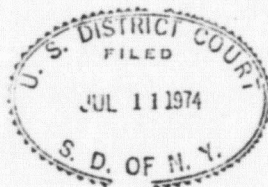
United States Attorney.

A TRUE BILL

James R. Lister

Foreman.

77-85-2-19-71-2051-0000



JUL 15 1974

adg 7-20-74

Buffy, Jr.

July 22, 1974

adg 7-29-74

Buffy, Jr.

JUL 29 1974

Def't appears (atty Robert
Thur, Legal Aid Society) Court
directs a NY plea be entered
10 days for notice. Can assigned
to Proc. Mahon, J. Def't ROR
Stewart, J.

9-16-74 Order that Dr. Stanley Portnow, a
qualified physician, examine the
def't for the purpose of determining
the def't's competency. Order that
U.S.A. pay Dr. Portnow a reasonable
fee for his performance of these services.
Buckley, J.

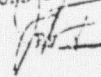
DOC B

1-12-76. Deft did not appear for sentencing
Attorney (Mr. Thau) present. Post moves for
issuance of B/W. Motion granted. So ordered. u
J MacMahon

12-3-76 Deft. present (Atty. Roland Thau)
Remanded. To be rebound 12-6-76. S

12-6-76 Deft. present (Atty. Thau). Sentenced
to 2 years imprisonment with
the recommendation that he be sent
to a Federal facility for the treatment
of drug addiction. The Clerk is
directed to ~~send~~ file a notice
of appeal on behalf of deft.
MacMahon J. J

App. 4

A TRUE COPY
RAYMOND P. BURCHARDT, Clerk

Deputy Clerk

DATE

Certified to be a correct transcript of Docket Entries.

Dated _____, 19____

United States Magistrate

[illegible]

Dated _____, 19____

United States Magistrate

United States of America vs.

United States District Court for

DEFENDANT

JOHN DEGAFFENRIED

SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. 74 Cr. 692-LFM

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
December 6, 1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Roland Thau

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

FINDING &
JUDGMENT

There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly
forging and counterfeiting the endorsement of the payee on a U.S. Treasury
Check. (Title 18, United States Code, Section 495.)

SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS with the recommendation that he be sent to a Federal facility for the treatment of drug addiction.

SPECIAL
CONDITIONS
OF
PROBATION

MICROFILM
DEC 6 1976

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

Handwritten signature: Louis F. Max Miller

Date December 6, 1976

7-2-68 1000

**GENERAL
CONDITIONS
OF
PROBATION**

Where probation has been ordered, the defendant shall, during the period of probation, conduct himself as a law-abiding, industrious citizen and observe all conditions of probation prescribed by the court. TO THE DEFENDANT - You shall:

- (1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
- (2) associate only with law-abiding persons and maintain reasonable hours;
- (3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
- (4) not leave the judicial district without permission of the probation officer;
- (5) notify your probation officer immediately of any change in your place of residence;
- (6) follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

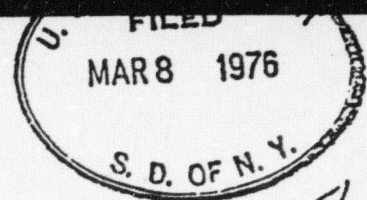
United States Marshal.

By _____

Deputy Marshal.

DOC D

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK



3 UNITED STATES OF AMERICA

:Before:

:HON. LLOYD F. MacMAHON, D.J.,

and a Jury

4 vs.

5 JOHN DEGAFFENRIED,

74 CRIM. 692

6 Defendant.

7 -----X

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9 New York, December 10, 11, 1975

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21 STENOGRAPHER'S MINUTES

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DOC E

App. 11

94WS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

JOHN DECATENHIED,

Defendant.

74 Cr. 692

Before:

HON. LLOYD F. MacMAHON,

District Judge.

New York, December 10, 1975;
10.00 o'clock a.m.
(Room 1305)

APPEARANCES:

THOMAS J. CAHILL, Esq.,

United States Attorney for the
Southern District of New York;

BY: STEVEN SCHATZ, Esq.,

SHIRAH NEIMAN, Esq.,

Assistant United States Attorneys.

ROLAND THAU, Esq.,

Attorney for Defendant.

App. 11a

1 jks P. DeGraffenried - cross

2 Q He never spoke to you about it?

3 A Well, yes, there was a situation, but it wasn't
4 in '74 that I knew of.

5 Q I'm sorry, I didn't hear.

6 A He was taking drugs at one time, but I wasn't
7 here in the States then.

8 Q What type of drugs was he taking?

9 MR. THAU: Excuse me, the witness says it wasn't
10 in '74, he was not in the United States at that time.

11 MR. SCHATZ: If he knows.

12 MR. THAU: Too remote in time to begin with.

13 In addition, this witness, who was elsewhere --

14 MR. SCHATZ: Is defense counsel giving a
15 speech, your Honor?

16 MR. THAU: No, your Honor, it is an objection.

17 THE COURT: Is it a question?

18 Overruled.

19 Q Could you please answer the question, Mr.
20 DeGraffenried?

21 A Yes, when I was away in Vietnam my brother
22 wrote me a letter informing me that my brother was using
23 heroin.

24 MR. THAU: Objection to hearsay.

25 THE COURT: Yes, strike the hearsay.

Q To the best of your knowledge, he was not taking any heroin at that time, is that right?

A Not that I know of, no, to the best of my knowledge, no.

THE COURT: At what time?

Q Back in February 1974?

A No.

Q While you were living with your brother, did he ever walk around the apartment without his shirt on?

A While I was living with my brother? I never lived with my brother.

MR. THAU: Objection. It is not a nudity case or obscenity case.

THE COURT: Mr. Thau, come up.

(At side bar.)

THE COURT: I want you to quit making those remarks. I know that other judges must let you get away with this, but if you do it once more I am going to hold you in contempt. Now, you stop it. You know better. You have been around here for four or five years. If you have got an objection, make it. Don't stand up and say, "This isn't a nudity case." I know this isn't a nudity case. Now don't do it again. You may be Legal Aid, but that doesn't mean a damn thing to me. You stop

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P.DeGraffenried - cross

180

MR. THAU: I am not taking special license --

THE COURT: You stop it.

MR. THAU: May the record show that you have
said this so loudly that even though it is at the bench
it is within the hearing of the jury?

MR. SCHATZ: I strongly disagree.

THE COURT: You are just an outright liar.

MR. THAU: I beg your pardon?

THE COURT: Proceed.

MR. THAU: I hope that is on the record.

THE COURT: I hope it is, too.

MR. THAU: I move for a mistrial on the state-
ment just made by the Court that I was an outright liar.

MR. SCHATZ: It is clear to me that the jury
did not hear your Honor's comments.

THE COURT: Of course not.

(Open court.)

THE COURT: All right, let's proceed here.

MR. SCHATZ: I'm sorry, your Honor, proceed?

THE COURT: Yes.

Q Could you please answer my question?

A What was your question?

Q Did your brother ever walk around the apartment

A Yes, sir.

Q And you have heard the testimony of the various agents and their testimony as to your statements at the time is essentially correct, is that right?

A Yes, sir.

MR. SCHATZ: I have no further questions.

MR. THAU: No questions.

THE COURT: You're excused.

(Witness excused.)

THE COURT: Do you rest, Mr. Thau?

MR. THAU: Yes, your Honor.

MR. SCHATZ: Your Honor, if I could have 30 second I may want to have a 30-second rebuttal witness.

THE COURT: The jury can take a 30-second recess.

(Jury left the courtroom.)

THE COURT: Mr. Thau, you reserved at the close of the Government's case and now make both of your motions.

MR. THAU: I wanted to make another motion just now. This time, your Honor, I move for a mistrial on the ground that some time earlier this morning, at a bench conference, your Honor called me a liar. Now, it is subjective whether the jury heard it or not. Mr. Schatz

1 jks
2 gave his opinion that they didn't. I don't assert that
3 they definitely did. All I can say is that in my
4 judgment, perhaps because of the importance of the words,
5 I felt that perhaps they did. There is a possibility
6 of it.

7 But in addition thereto, your Honor, as the
8 defendant was getting off the stand and Juror No. 7 was
9 passing you by, right after you called this very short
10 recess we are on now, your Honor said to the Court Reporter,
11 who was then standing at the bench, "Unbelievable.
12 Unbelievable."

13 Now, I am sitting some 30 feet away from your
14 Honor. I am not eavesdropping on the Court's conversa-
15 tions, but I assert to you, and I would take an oath to it,
16 that I heard it.

17 THE COURT: You heard me say "unbelievable"
18 or "incredible"?

19 MR. THAU: Yes.

20 THE COURT: You sure did, but it wasn't with
21 reference to you.

22 MR. THAU: Perhaps not. I am not saying
23 that it definitely was, but the point is that the defendant
24 had just gotten off the stand and Juror No. 7 was perhaps
25 within five feet or seven feet, let's say, of your Honor

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as she was getting out of the jury box.

THE COURT: Mr. Thau, I am going to grant your motion for a mistrial and with the request that you never appear before me again. I think you are an accomplished incompetent as well as being a wise guy and outright liar.

We will impanel a jury next week in this case.

MR. THAU: Your Honor, I am due to be before Judge Metzner on Monday and, of course, I would need the minutes of these proceedings.

THE COURT: This case is a mistrial. You are going to be removed from it when Mr. Mogel gets here at five minutes of one and proceed with some other lawyer. I can save the Legal Aid Society and yourself and me a lot of embarrassment if in the future when a case is assigned to me you bow out.

MR. THAU: Would your Honor elaborate on why I am a liar? In my 12 years at the bar --

THE COURT: Because you outright misrepresented. I was speaking in a whisper here. I was just admonishing you for your constant disregard of my directions to you, to stop making remarks.

MR. THAU: I don't know if the jury heard. I didn't say they heard.

1 jks

2 THE COURT: You don't know it, but you asserted
3 it up here on the record.

4 MR. THAU: I was in fear --

5 THE COURT: You asserted it on the record.
6 You are talking to the Court of Appeals, trying to make a
7 point like any punk, not as a lawyer who represents Legal
8 Aid, and not like the kind of lawyer I like to see assigned
9 to defend somebody in my cases. That is why.

10 MR. SCHATZ: Your Honor, could I make a
11 suggestion?

12 THE COURT: I did not speak loud. I spoke
13 softly.

14 MR. THAU: I am not saying you screamed by any
15 means.

16 THE COURT: I didn't scream, nor did I speak
17 loud, and you forced me to do it by repeatedly ignoring
18 my directions.

19 MR. THAU: Perhaps the import of the words
20 themselves were such that they sounded louder to me than --

21 THE COURT: I don't need this kind of thing,
22 not for these prices. I don't need it. I don't have
23 to put up with guys like you.

24 MR. THAU: I withdraw my application for a
25 mistrial and I apologize to the Court.

1 jks

2 THE COURT: I granted it. I don't want any-
3 thing to do with you. I grant the mistrial. We will
4 set another date as soon as we get new counsel.

5 MR. SCHATZ: May I briefly be heard on this?

6 In light of the fact that Mr. Thau has withdrawn
7 his application, and in light of the fact that I was
8 certainly present and I feel confident the jury couldn't
9 hear it, I feel that it would be a colossal waste of the
10 Court's time --

11 THE COURT: It is a waste of the Court's time.

12 MR. SCHATZ: And the Government's time.

13 THE COURT: But better we waste it than we
14 have this kind of an issue in the case. It is just wholly
15 irrelevant to anything to do with justice. It is an
16 outright misrepresentation on Mr. Thau's part. I don't
17 want any part of such a fraudulent record.

18 MR. THAU: You want to --

19 MISS NEIMAN: Mr. Thau is withdrawing the
20 application and I think he recognizes that your Honor is
21 right and I just think --

22 MR. THAU: I apologize to you if I personally
23 offended you. I assure you whatever you think of me
24 that I personally revere the bench and the administration
25 of justice, and it is out of some kind of paranoia perhaps

1 jks

2 that I spoke as I did. I withdraw the application.

3 I waive as an appellant issue the possibility that a juror

4 overheard. I am unduly touched by being called a liar

5 which the Court must understand.

6 THE COURT: Perhaps that was strong.

7 MR. THAU: I apologize.

8 THE COURT: It may have been strong.

9 MR. THAU: Take my apology.

10 THE COURT: But you surely provoked me.

11 MR. THAU: Take my apology for what it stands
12 for.

13 THE COURT: I don't like these issues in cases.

14 MR. THAU: I apologize to your Honor. It's
15 never happened before. I withdraw the application.
16 We waive that particular issue for appellate purposes.
17 I have discussed it with DeGraffenried. I don't think
18 it is an important issue in the case.

19 THE COURT: Mr. DeGraffenried, what do you say?
20 Do you want a new trial with a new lawyer or do you want
21 to go on with this one?

22 THE DEFENDANT: I don't know what to say, sir.

23 MR. THAU: May I have a short instant with him?

24 Thank you, your Honor.

25 (Pause.)

App. 20

1 jks

2 THE DEFENDANT: Excuse me, your Honor.

3 My sister-in-law is having trouble with the baby-sitter,
4 and it would be kind of rough to get her in another trial,
5 so if we can proceed with this, sir, I would appreciate it
6 very much.

7 THE COURT: I grant the motion. We will set
8 another date.

9 MR. SCHATZ: May we make another suggestion?
10 We could couple this with an instruction that --

11 THE COURT: No, no. I grant the motion.

12 MISS NEIMAN: If your Honor inquires whether
13 the jury overheard and they say no, there is no appellate
14 issue.

15 MR. SCHATZ: That's clear, your Honor.
16 I think we can rectify this right here and now by inquiring
17 of the jury whether they overheard.

18 MISS NEIMAN: The comments of counsel or the
19 bench during any of the bench conferences.

20 MR. SCHATZ: I think that would rectify it.

21 MR. THAU: I think since I am waiving it there
22 would not be any need for it. I was unduly touched by
23 your Honor's remark. Forgive me.

24 THE COURT: It was too strong a remark, but you
25 provoked me.

1 jks

2 MR. THAU: May we proceed?

3 THE COURT: We will call the jury back. I will
4 voir dire them whether they heard anything at the bench.

5 MR. THAU: I am not even asking for a voir dire,
6 your Honor, your Honor. You understand me?

7 THE COURT: I understand.

8 MISS NEIMAN: I think we should have one in view
9 of defendant's comments.

10 THE COURT: I am quite aware of that.

11 (Jury present.)

12 THE COURT: Have any of you heard anything
13 that has been said here at the bench when I have had counsel
14 up here? Have any of you overheard anything that I have
15 said or that the counsel have said? If so, raise your
16 hand.

17 (No response.)

18 THE COURT: I gather none of you have overheard
19 anything that was said.

20 JUROR NO. 4: Well, I heard you say "Stop it,"
21 I think, or some such thing.

22 THE COURT: You heard me say that out loud?

23 JUROR NO. 4: Yes.

24 MR. SCHATZ: Your Honor, may I proceed?

25 THE COURT: Yes.

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MR. SCHATZ: The Government calls to the stand
Terry Chodosh.

THE COURT: We will accept the waiver, Mr. Thau.

MR. THAU: Thank you, your Honor.

- -

T E R R Y H O W A R D C H O D O S H , called as a
witness by the Government in rebuttal, being first
duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHATZ:

Q Mr. Chodosh, on February 5, 1974, did you ask
the defendant about whether he takes drugs or not?

A Yes, I did.

Q And what did he tell you?

A Actually, it was myself and Agent Altice at our
office at 90 Church Street.

THE COURT: What did he tell you?

THE WITNESS: Mr. DeGraffenried stated at that
time that he uses heroin but he wasn't addicted and we asked
him what was the last time that he used heroin, and he had
said the previous week.

Q Did you ask him to do anyth ing at that point?

A Agent Altice, prior to h is stating that he had
used heroin, asked him -- we asked him -- there's a section

App. 23

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CHARGE OF THE COURT

THE COURT: I want to say at the outset that
I have no opinion one way or the other as to what the
outcome of this case should be. That decision is up to
you and you are not to infer from any rulings that I have
made here or any directions that I have given to either
lawyer that I have any opinion one way or the other.

I want to caution you, however, that this case,
like any other trial, is a search for the truth. It isn't
a contest between lawyers, so don't judge it by their
relative skills. You have to judge the case.

Now, at this point in the trial it becomes my
function to instruct you on the law that applies to this
case and it is your duty to accept the law as I give it
to you whether or not you agree with it.

Now, just as I am the exclusive judge of the
law, you are the exclusive judges of the facts. You and
you alone determine what effect and what value you will
give to the evidence. You decide whether or not to
believe a witness and ultimately, of course, you decide
the guilt or innocence of this defendant on the charges
made against him in this case.

Finding the facts is merely a process by which
you, the jury, consider the exhibits which have been

2 received in evidence, consider the testimony of all of
3 the witnesses, sift out what you believe, reject what you
4 disbelieve, weigh what you believe in the scale of your
5 reasoning powers and draw such conclusions as your common
6 sense and your intelligence tell you that the evidence
7 supports and justifies and decide just where the truth
8 lies in this case.

9 Now, in that connection it is your memory of
10 the evidence that controls. It is not the way I remember
11 it and it is not the way counsel remember it.

12 If your memory of the evidence squares with the
13 lawyer's recollection of the evidence as they summed it up in
14 their closing arguments, you may accept what they say, but
15 to the extent that you have a different memory of it you are
16 bound by your oath to reject what they said and to rely on
17 your own memory.

18 Now, when I say rely on your own memory, I mean
19 the collective memory of the jury. Sometimes jurors are
20 only in the jury room a few minutes and they send out notes,
21 they want the testimony of this witness and the testimony
22 of that witness reread. Now, if in the last analysis you
23 can't remember it, we will have it reread.
24 The reporter will reread it, but he doesn't have a type-
25 written transcript of it yet. It will be months before

2 he does, and it will take some time for the reporter to
3 find it from his stenographic notes.

4 So, before you resort to that course, see
5 whether you can't help each other remember. One can
6 stimulate the memory of another.

7 Now, probably your most important function is to
8 decide which witnesses you are going to believe, and this
9 is so as to every witness, whether called by the Government
10 or by the defendant. This also applies to Government
11 agents or to police officers.

12 Now, you are not to be influenced by the number
13 of witnesses called by either side. Your concern is not
14 with the quantity of the evidence but with the quality of
15 the evidence -- not with the quantity of the testimony, but
16 with the quality of it.

17 The first test which you should apply in
18 determining the trustworthiness of a witness is to measure
19 what he says against your plain every-day common sense.
20 You are not bound to believe unreasonable statements, nor
21 to accept testimony that defies your common sense or, worse,
22 insults your intelligence, just because the statements are
23 made under oath on a witness stand.

24 You saw the witnesses in this case. In deciding
25 whether to believe a witness, you should consider the conduct
and manner of the witness as he testified on the stand.

1 I saw you watching these witnesses with particular care
2 as they were testifying. Obviously you were sizing them
3 up. How did the witness impress you? Was the witness
4 being frank with you or was he being evasive? How does
5 his story check out with all the other evidence and
6 testimony in the case? Particularly the documentary
7 evidence. Was the witness giving you straight answers
8 to straight questions or was he just parroting answers?
9 Was the lawyer putting words in his mouth? Did he have
10 any motive to testify falsely? Is he interested in any
11 way in the outcome of this case? How strong or weak
12 was his memory or important events?

13 In short, can you rely on him? Can you trust
14 him? Was he hostile or friendly to either side of this
15 case?
16

17 You ought to consider also his opportunity to
18 know the facts about which he testified and the probability
19 or improbability of what he said. Are there any
20 inconsistencies in his testimony? And if so, how
21 important are they? Has he made any inconsistent
22 statement on some earlier occasion and, if so, how important
23 are those inconsistent statements?

24 And in that connection, you should consider not
25 only what he said on the earlier occasion, but also what he did

not say. Did he omit something?

Now, admissions of a defendant are among the most effective proofs in the law and constitute strong evidence against the party making them.

Accordingly, you are entitled to give weight to the defendant's admissions in this case.

In this connection, you have heard testimony by a number of agents that the defendant made statements after he was arrested. If you find that he did make the statements, then you may give the statements such weight as you believe they deserve, after considering all of the evidence which was brought out in this case.

Now, if you find that any witness has deliberately and wilfully lied with respect to any material fact in his or her testimony offered at this trial, you may follow either one of two courses. You may accept as much of the witness' testimony as you believe or may reject his entire testimony.

Now, before discussing the crimes charged here, I want to remind you that an indictment is a mere accusation. It is not evidence of the truth of the charge made and you are to draw no inference of guilt from the mere fact that the defendant has been indicted.

An indictment simply means that the defendant

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has been accused of a crime. The defendant has denied his guilt, both by his plea of not guilty and by his testimony on the stand.

The defendant has no burden of proof to sustain in this case. He is under no obligation to produce any witnesses. He is presumed to be innocent and this presumption of innocence continues throughout the trial and during the deliberations of the jury. This presumption is overcome when and only when the Government establishes the guilt of a defendant beyond a reasonable doubt.

Now, what do I mean by beyond a reasonable doubt? As the phrase implies, a reasonable doubt is a doubt that is based upon reason, a reason which appears in the evidence or in the lack of evidence. It is not some vague, speculative, imaginary doubt, nor a doubt based upon emotion, sympathy or prejudice or upon what some juror might regard as an unpleasant duty.

The Government is not required to prove a defendant guilty beyond every possible doubt nor to an absolute or mathematical certainty, because such proof is usually impossible in human affairs.

You should review all of the evidence as you remember it, sift out what you believe, discuss it, analyze,

weigh and compare your view of the evidence with that of your fellow jurors.

Talk out your differences. If that process produces a solemn belief or conviction in your mind such as you would be willing to act upon without hesitation if this were an important matter of your own, then you have been convinced beyond a reasonable doubt.

On the other hand, if your mind is wavering and so uncertain that you would hesitate before acting, if this were an important matter of your own, then you have not been convinced beyond a reasonable doubt and your verdict must be not guilty.

Now, the indictment in this case is very short, and it charges that on or about the 5th day of February 1974, in the Southern District of New York, John DeGraffenried, the defendant, unlawfully, wilfully and knowingly did falsely make, alter, forge and counterfeit and cause to be made, forged and counterfeited a writing, namely, the endorsement of the payee of the United States Treasury check, to wit, the words "George Knox" on the back thereof, for the purpose of obtaining and enabling another person either directly or indirectly to obtain from the United States and its officers and agents a sum of money, the check being a genuine obligation of the

United States and of the following tenor.

And then there is reproduced a photostat of a check which is now in evidence as Government's Exhibit 1, and you can refer to that and the Court will hand you a copy of the indictment when you retire to the jury room, so that you can follow the charge.

Now, this inictment is based upon a federal law, and the number of that law is Title 18, Section 495, which you will see at the foot of the indictment, and that law provides:

"Whoever falsely make, alters, forges or counterfeits any writing for the purpose of obtaining or receiving either directly or indirectly from the United States or any officer or agent thereof any sum of money shall be guilty of a crime."

In order to establish the guilt of the defendant, the Government must prove to your satisfaction beyond a reasonable doubt each of the following three elements:

1. That the defendant without authority wrote the name George Knox on the reverse side of a United States Treasurer's check in evidence as Exhibit 1, and that that check was a genuine obligation of the United States.

2. That the defendant intended to defraud by obtaining a sum of money, directly or indirectly, from the

United States.

3. That the defendant acted unlawfully, wilfully and knowingly.

Now, with respect to the first element, that the defendant wrote the name George Knox on the back of the check, there seems to be no dispute in this case. As I recall it, the defendant admitted that he signed the name George Knox and that he did not have the permission of the payee, and in that connection, you will recall that there is a stipulation in evidence which will be sent in to you, that if George Knox were called as a witness, he would testify that he received this check as part of his pay from the Air Force, that he took the check to his apartment, the check then turned up missing, that he did not sign his name to the check, nor authorize anyone to sign the check.

Now, what is a forgery? Forgery, for our purposes, is simply the writing of the payee's, George Knox, endorsement upon a genuine United States Treasurer's check by a person other than George Knox, if done without Knox's permission or authority and with an intent to defraud.

The essence of forgery is the lack of genuineness of the signature.

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2 You will recall also that there is a stipulation
3 here that the parties have agreed that Exhibit 1, the
4 Treasury check in issue here, was a genuine obligation of
5 the United States. Therefore you need not concern
6 yourself with that aspect of the first element.

7 As to the second element, that the defendant
8 intended to defraud by obtaining a sum of money directly or
9 indirectly from the United States, a person who forges a
10 United States Treasurer's check or passes one knowing that
11 it contains a forgery, is presumed to know that the United
12 States might pay out money as a result of the forgery.
13 You may find that there was an intent to defraud if you
14 find that the defendant deliberately intended to get money
15 which he knew did not belong to him or if he acted with an
16 intent to deceive or to cheat.

17 There is no requirement that the evidence
18 establish that the United States or anyone was actually
19 defrauded but only that the defendant intended to defraud
20 the United States.

21 In other words, he doesn't have to be successful
22 if he had that intent that satisfies this element.

23 You may also find an intent to defraud, if you
24 find that the defendant knowingly obstructed the Government
25 in the payment of **its** obligation to Knox.

Now, for the third element that the defendant acted unlawfully, knowingly and wilfully. The term unlawfully simply means that the defendant's conduct violates the law. The term knowingly means that the defendant must have known what he was doing, that he acted freely and voluntarily, deliberately or on purpose and not because of some mistake, accident, carelessness or other innocent reason. And the term wilfully means that the defendant acted freely and voluntarily in the exercise of his own free will, that he acted knowingly, intentionally, and on purpose.

Now, the key to this element of the crime is the defendant's guilty knowledge and intent.

In determining the guilt of a defendant it is obviously impossible to look into his mind. However, you may infer his intent from the way he acts, by what he said and from the context of all of the surrounding circumstances in the transaction in issue here. Thus the adage actions speak louder than words applies here.

Now, in determining intent, therefore, you should consider all the evidence which you recall and believe as to what the defendant said, what he did or failed to do, and the way he acted or failed to act in the context of all the surrounding circumstances.

In short, consider how he conducted himself. Were his actions open, above board and innocent or were they secret, furtive and devious?

Does his conduct, as shown by the evidence, reveal a consciousness of guilt or does it speak of an innocent state of mind?

Now, in this connection the defendant claims that he attempted to cash this check due to coercion and that he forged it because of coercion. Every crime, as I have told you, requires a voluntary, free state of mind, the exercise of a free choice, the exercise of a free will. It therefore may be a defense to a criminal charge that the act constituting the crime was not committed freely and voluntarily but was the result of coercion, compulsion or necessity.

However, the term necessity or coercion in the sense of a defense to a crime has a very particular meaning. Specifically it must be some unavoidable circumstance, condition or fact which leaves no choice of action.

In order to excuse a criminal act on the ground of coercion or duress, compulsion or necessity, one must have acted under the fear or apprehension of immediate and impending death or serious and immediate bodily harm.

Furthermore, there must be no reasonable oppor-

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2 tunity to escape that compulsion without committing the
3 crime or participating in the commission of the crime.

4 A fear or an apprehension that is vague or
5 imprecise or that is not a fear of immediate harm or death
6 is insufficient to substantiate the defense of coercion.

7 Finally, even if an initial step in a criminal
8 venture is the product of duress or coercion, if the
9 defendant of his own volition decides to continue with
10 the criminal enterprise after there is no reason to be
11 afraid, then he cannot raise the defense of duress.

12 So consider all of the evidence. If you find
13 that the Government has failed to prove to your satis-
14 faction beyond a reasonable doubt each of the three elements
15 of the crime as I have defined them, then you must acquit
16 the defendant.

17 On the other hand, if you find that the Govern-
18 ment has proved to your satisfaction beyond a reasonable
19 doubt all three elements of the crime, then you should
20 convict the defendant.

21 Now, you are instructed that the question of
22 possible punishment in the event of a conviction is not
23 your concern, and you should not let it enter into or
24 influence your deliberations.

25 The duty of imposing sentence in the event of

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a conviction rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely upon the basis of that evidence.

Now, when you retire to the jury room treat each other with consideration and respect as I know you will. If differences of opinion arise your discussion should be dignified, calm and intelligent. Your verdict must be based on the evidence and the law, the evidence which was presented in this case as you remember it and the law as I have given it to you in this charge.

You are each entitled to your own opinion. No juror should acquiesce in a verdict against his individual judgment. Nevertheless, I would point out that no one should enter the jury room with such pride of opinion that he would refuse to change his mind if convinced by intelligent argument on the part of another juror or jurors.

Discussion and deliberation are part of our American democratic jury process and your deliberations should be approached in that spirit. Talk out your differences. Each of you should, in effect, decide the case for himself or herself after thoroughly reviewing the evidence and frankly discussing it with your fellow jurors

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2 with an open mind and with a desire to reach a verdict.

3 If you do that, you will be acting in the true
4 democratic process of the American jury system.

5 There are 12 of you on this jury. The
6 alternates will be excused before you retire for your
7 deliberations. Any verdict must be the unanimous verdict
8 of all of you and it must represent the honest conclusion
9 of each of you.

10 I submit the case to you with every confidence
11 that you will fully measure up to the oath which you took
12 as members of the jury, to decide the issue submitted to
13 you fairly and impartially and without fear or favor.

14 Now, members of the jury, if you find that the
15 Government has failed to establish the guilt of the
16 defendant beyond a reasonable doubt, you should acquit
17 him.

18 On the other hand, if you find that the Govern-
19 ment has established his guilt beyond a reasonable doubt,
20 you should not hesitate because of sympathy or any other
21 reason to render a verdict of guilt.

22 Your forelady, therefore, will return an oral
23 verdict in open court of either guilty or not guilty.

24 Are there any exceptions, gentlemen? If so,
25 I will hear you at the side bar.

2 (At side bar.)

3 MR. THAU: Your Honor, we object to your Honor
4 saying, when discussing the credibility of witnesses, that
5 the jury should decide whether a witness was parroting words
6 which had been placed in his mouth by the lawyer.

7 THE COURT: I note your exception.

8 MR. THAU: Your Honor said that the defendant
9 claims that he attempted to cash the check through coercion.
10 Our position is that he didn't even attempt to cash it. We
11 admit signing with knowledge that the thing wouldn't be
12 cashed to begin with.

13 (Open court.)

14 THE COURT: I said that the defendant claims --
15 that the defendant attempted to cash the checks through coer-
16 cion, I misquoted. As I told you, it is your memory of the
17 evidence; whether or not he attempted to cash the check is
18 up to you.

19 (Side bar.)

20 MR. THAU: Just one more. I would ask the
21 Judge to instruct them that having raised the coercion de-
22 fense they are bound to acquit unless the Government has dis-
23 proven coercion beyond a reasonable doubt.

24 THE COURT: I decline to do that. You sub-
25 mitted no such request and I don't like drafting requests
on the bench.

MR. THAU: That is all I have.

MR. SCHATZ: Just one request.

We would ask the Court to give the equally
unavailable charge.

THE COURT: No, I decline to do that.

Mr. Thau didn't touch on that. It only serves to confuse
things.

(Open court.)

THE COURT: Swear the Marshal.

(Marshal sworn.)

THE COURT: Miss Marshal, you may take the jury
to lunch whenever they wish to go.

THE MARSHAL: All right, sir.

THE COURT: Advise us when they do so we can
also go to lunch.

The alternates are excused with the thanks of
the Court.

Take the jury in. You will make the call
afterwards.

(Jury retired at 12.55 o'clock p.m.)

MR. SCHATZ: Let the record reflect that I am
now here with Mr. Thau and I am going to quickly go through
the 3500 list of material which I have handed over.
Unless Mr. Thau states an objection, the record should

S. Schat

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3/28/17